First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–2932 OF 2010
RAUS SHARIF PCA, RAMLY ALI AND ALIZATUL KHAIR JJCA
28 MARCH 2013

Civil Procedure — Appeal — Facts, finding of — Whether appellate court should interfere — Whether crucial evidence misconstrued — Whether judge did not properly evaluate evidence — Whether clear misdirection by judge

Contract — Breach — Repudiation — Effect, of — One party refusing to perform — Remedy available to innocent party — Test for deciding whether innocent party has accepted repudiation of contract

Contract — Estoppel — Estoppel by conduct — Plaintiff accepting reduced payments and continuing to perform contract for six years instead of insisting on performance of terms of original contract — Whether plaintiff estopped from asserting its rights under terms of original contract

The appellant/defendant was the licensee under a timber license for a concession area. The defendant had engaged the respondent/plaintiff as their contractor to fell, extract and harvest timber logs from the concession area and to transport the timber logs. The plaintiff claimed that it had entered into a collateral agreement, partly orally, partly in writing and partly by conduct with the defendant, wherein it was a term that the defendant will ensure the income from the timber operation would be sufficient for the plaintiff to make a net profit after making payment of various overheads. The plaintiff maintained that it was as a result of the collateral agreement that the plaintiff entered into the timber extraction agreement ('the TE agreement') with the defendant. The plaintiff claimed that in breach of the collateral agreement and/or the TE agreement, the defendant had unilaterally imposed a reduction on the contract fees by 20 percent, purportedly due to depressed timber market. The plaintiff's monthly invoice claim for the month of June 2001 was rejected by the defendant and the plaintiff was asked to re-submit their claims and all future claims based on the reduced rates. The plaintiff purportedly complied, albeit, with protest. Due to the reduction of the contract fees the plaintiff claimed to have suffered losses. According to the plaintiff, the defendant had also illegally imposed interest charge on certain machineries sold to the plaintiff. Further, the defendant was said to have misrepresented to the plaintiff regarding the

actual monthly production limit ('MPL') figures, thereby causing the plaintiff losses. The plaintiff thus commenced an action against the defendant claiming: (a) wrongful reductions of the contract fee; (b) misrepresentations as to volume of timber extracted; (c) failure to allocate and/or notify the MPL and; (d) wrongful imposition of interest on the equipment sold. The defendant denied the existence of the collateral agreement. The defendant claimed that the reduction of the contract fees was in accordance with the TE agreement and the plaintiff had by conduct accepted the reduction. The defendant in turn counterclaimed for special damages by reason of the plaintiff's failure to achieve the requisite MPL as stated in the TE agreement. The learned High Court judge ('judge') allowed the plaintiff's claim in part and dismissed the defendant's counterclaim. The defendant appealed and the plaintiff cross-appealed against the said decision.

Held, allowing the defendant's appeal and dismissing the plaintiff's cross-appeal:

(1) An appellate court will only interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded. Based on the facts and circumstances of the present appeal, the judge did not properly evaluate the evidence and ask herself the right question in arriving at the decision as she did. There was clear misdirection on her part (see paras 20–23); *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 (FC) referred; *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165 referred; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 referred.

(2) The plaintiff had accepted the reduced contract fees and continued to perform the contract when it had the option of insisting on the performance of the terms of the original contract. As such, the plaintiff was barred from asserting something when it had the right and opportunity to do so earlier. The doctrine of estoppel applied to estop the plaintiff from making any claim which appeared to be an afterthought against the defendant under the contract. It would be unjust and unconscionable to permit the plaintiff to file an action to question the validity of the reduction of the contract fees after six years (see paras 27–28); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 referred.

(3) If one party to a contract has refused to perform or disabled himself from performing his promise in its entirety the other party as an innocent party may accept that non-performance, repudiate the contract and sue for damages for breach of contract. In the event he elects to disregard the breach, the contract remains in full effect and he is said to have 'affirmed', the contract. The test for deciding whether the innocent party elected one

way or the other is an objective one and it is for the court to infer from the surrounding circumstances of each case (see para 34); *Mintye Properties Sdn Bhd vs Yayasan Melaka* [2006] 6 MLJ 420 followed.

(4) The plaintiff, after realising the purported non-performance of the contract by the defendant and having the option of accepting the non-performance and ending the contract, had continued to work in the logging operations for the defendant for the period of nearly 54 months. Having done so, the plaintiff is said to have 'affirmed' the contract and acquiesced in its continuance. The plaintiff had accepted the breach and elected to continue with the contract by performing his part of the bargain. This election was clearly communicated to the defendant by its act of continuing with the contract with the reduced contract fees. Applying the objective test, the plaintiff did not put an end to the original contract and it was still subsisting. The plaintiff having made such election could not retract itself from it (see para 38).

(5) Another misdirection on the part of the judge was where the plaintiff was awarded damages notwithstanding its failure to produce any statement of account, source of information and computation or breakdown of the alleged loss flowing from the alleged breach (see para 46); *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 referred; *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (Rep) 644 referred.

[Bahasa Malaysia summary

Perayu/defendan merupakan pemegang lesen di bawah lesen pembalakan untuk kawasan konsesi. Defendan telah berurusan dengan responden/plaintif sebagai kontraktor mereka untuk menebang, mengekstrak dan mengumpul kayu-kayu balak daripada kawasan konsesi dan mengangkut kayu-kayu balak tersebut. Plaintif mendakwa bahawa ia telah memeterai perjanjian kolateral, sebahagiannya secara lisan, sebahagian dalam bentuk tulisan dan sebahagiannya melalui perilaku dengan defendan, yang mana adalah menjadi terma bahawa defendan akan memastikan hasil kutipan daripada operasi pembalakan tersebut adalah mencukupi bagi plaintif untuk dijadikan keuntungan bersih selepas membayar pelbagai overhed. Plaintif menegaskan bahawa disebabkan perjanjian kolateral tersebut plaintif telah memeterai perjanjian pengekstrakan balak ('perjanjian PB') dengan defendan. Plaintif mendakwa bahawa dalam memungkiri perjanjian kolateral dan/atau perjanjian PB, defendan secara unilateral telah mengenakan pengurangan 20 peratus terhadap fi kontrak, disebabkan pasaran pembalakan yang meleset. Tuntutan invois bulanan plaintif untuk bulan Jun 2001 telah ditolak oleh defendan dan plaintif telah diminta untuk menyerahkan semula tuntutan mereka dan kesemua tuntutan pada masa hadapan berdasarkan kadar yang dikurangkan. Plaintif dikatakan telah mematuhi, walaupun, dengan bantahan. Disebabkan pengurangan fi kontrak tersebut plaintif mendakwa telah

mengalami kerugian. Menurut plaintif, defendan juga telah dengan tidak sah mengenakan caj faedah ke atas beberapa mesin-mesin yang dijual kepada plaintif. Selanjutnya, defendan dikatakan telah melakukan misrepresentasi kepada plaintif berkenaan dengan angka sebenar had pengeluaran bulanan ('HPB'), yakni menyebabkan kerugian terhadap plaintif. Plaintif justeru memulakan tindakan terhadap defendan dan menuntut: (a) pengurangan fi kontrak yang salah; (b) misrepresentasi mengenai bilangan balakan yang diekstrak; (c) kegagalan mengguntukkan dan/atau memaklumkan HPB dan; (d) pengenaan faedah dengan salah ke atas peralatan yang dijual. Defendan menafikan kewujudan perjanjian kolateral tersebut. Defendan mendakwa bahawa pengurangan fi kontrak adalah menurut perjanjian PB dan plaintif telah melalui perilakunya menerima pengurangan tersebut. Defendan sebaliknya menuntut balas untuk ganti rugi istimewa akibat kegagalan plaintif untuk mencapai HPB yang diperlukan seperti yang dinyatakan di dalam perjanjian PB. Hakim Mahkamah Tinggi yang bijaksana ('hakim') telah membenarkan sebahagiam tuntutan plaintif dan menolak tuntutan balas defendan. Defendan membuat rayuan dan plaintif telah membuat rayuan balas terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan defendan dan menolak rayuan balas plaintif:

(1) Mahkamah rayuan hanya akan campur tangan dan mengganggu dapatan fakta hakim bicara sekiranya keterangan penting telah disalah tafsir yang mana menyebabkan kesangsian terhadap keterangan satu pihak dan ketepatan keterangan pihak yang satu lagi telah diendahkan. Berdasarkan fakta dan keadaan rayuan ini, hakim tidak mempertimbangkan keterangan dengan betul dan mempersoalkan pertanyaan yang betul dalam membuat keputusan yang telah diputuskan oleh beliau. Terdapat salah arah yang jelas di pihak beliau (lihat perenggan 20–23); *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 (FC) dirujuk; *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165 dirujuk; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 dirujuk.

(2) Plaintif telah menerima fi kontrak yang dikurangkan dan terus melaksanakan kontrak apabila ia mempunyai pilihan untuk berkeras atas pelaksanaan terma-terma kontrak asal. Oleh itu, plaintif dihalang daripada menegaskan sesuatu apabila ia mempunyai hak dan peluang untuk melakukannya sebelum itu. Doktrin estopel digunapakai untuk mengestop plaintif daripada membuat apa-apa tuntutan terhadap defendan di bawah kontrak yang jelas seperti sesuatu yang difikirkan kemudian. Adalah tidak adil dan tidak berpatutan untuk membenarkan plaintif memfailkan tindakan untuk mempersoalkan kesahan pengurangan fi kontrak selepas enam tahun (lihat perenggan 27–28); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 dirujuk.

(3) Sekiranya satu pihak kepada kontrak enggan untuk melaksanakan atau menyebabkan dirinya tidak berkeupayaan untuk melaksanakan janjinya secara keseluruhan pihak yang satu lagi sebagai pihak tidak bersalah boleh menerima kegagalan tersebut, membatalkan kontrak dan menyaman untuk ganti rugi untuk kemungkiran kontrak. Dalam kejadian di mana dia memilih untuk mengendahkan percanggahan tersebut, kontrak masih mempunyai efek yang sepenuhnya dan dia dianggap telah 'affirmed' kontrak tersebut. Ujian untuk menentukan sama ada pihak tidak bersalah telah memilih satu jalan atau jalan yang lain adalah sesuatu yang objektif dan adalah bagi mahkamah untuk membuat kesimpulan daripada keadaan sekeliling setiap kes (lihat perenggan 34); *Mintye Properties Sdn Bhd vs Yayasan Melaka* [2006] 6 MLJ 420 diikut.

(4) Plaintif, selepas menyedari kontrak telah tidak dilaksanakan oleh defendan dan dengan mempunyai pilihan untuk menerima kegagalan tersebut dan menamatkan kontrak, telah meneruskan kerja di dalam operasi pembalakan untuk defendan untuk tempoh lebih kurang 54 bulan. Dengan melakukan sedemikian, plaintif dianggap telah 'affirmed' kontrak dan bersetuju untuk meneruskannya. Plaintif telah menerima kemungkiran dan memilih untuk meneruskan kontrak dengan melaksanakan bahagiannya di dalam perjanjian tersebut. Pilihan ini dengan jelas telah dihubungkan kepada defendan melalui tindakannya untuk meneruskan kontrak dengan fi kontrak yang dikurangkan. Dengan menggunapakai ujian objektif, plaintif tidak membatalkan kontrak asal dan ia masih lagi berterusan. Plaintif dengan membuat pilihan sedemikian tidak boleh menarik diri daripadanya (lihat perenggan 38).

(5) Satu lagi salah arah di pihak hakim adalah di mana plaintif telah diawardkan ganti rugi meskipun kegagalannya untuk mengemukakan apa-apa penyata akaun, sumber maklumat dan kiraan atau penghuraian kerugian yang didakwa telah disebabkan oleh kemungkiran yang didakwa (lihat perenggan 46); *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 dirujuk; *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 dirujuk.]

Notes

For a case on repudiation, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3160.

For cases on estoppel by conduct, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4227–4243.

For cases on facts, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1169–1173.

Cases referred to

Alliedbank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1; [1998] 2 CLJ 33, HC (refd)

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Bank Commerce International [1982] QB 84, CA (refd)

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, HC (refd)

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411; [2003] 4 CLJ 785, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165b, PC (refd)

Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587; [1997] 1 CLJ 23, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627; [1994] 3 CLJ 1, SC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569; [1994] 4 CLJ 783, SC (refd)

Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420; [2006] 4 CLJ 267, CA (folld)

Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184; [1982] CLJ 107, FC (refd)

New Chew v KBC Sawmill Sdn Bhd & Anor [1996] MLJU 524; [1998] 1 CLJ Supp 16, HC (refd)

Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ 635 (Rep), HC (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd)

Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147, HC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 64
Evidence Act 1950 s 90A, (2)
Hire Purchase Act 1967
Land Acquisition Act 1960 Form G

Henry Ling Kuong Meng (Ling and Wong) for the appellant.
Bong Ah Loi (Suhaili Bong) for the respondent.

Raus Sharif PCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the learned High Court judge dated 20 August 2010 allowing the respondent's claim in part and dismissing the appellant's counterclaim against the respondent. Aggrieved by the High Court decision the respondent in turn had also filed a cross-appeal.

[2] The appellant is the defendant and the respondent is the plaintiff. For convenience parties will be referred to as plaintiff and defendant, as in the trial court.

[3] The plaintiff's claim against the defendant in the High Court was for loss and damages caused by breach of a purported collateral agreement and/or a timber extraction agreement dated 13 October 2000 entered between the plaintiff and the defendant. The defendant's counterclaim was for special damages by reason of the plaintiff's failure to achieve the monthly production limit ('MPL') as stated in the timber extraction agreement.

BACKGROUND FACTS

[4] The facts may be briefly set out as follows. The defendant is the licensee under the Timber License No T/3148 at Ulu Baleh, Kapit Division, Sarawak ('concession area'). Initially, the defendant had engaged the services of a company known as Unique Evergreen Sdn Bhd ('Unique Evergreen') as their main contractor to fell, extract and harvest timber logs from the concession area and thereafter to transport the timber logs to a transit camp and then to Putai Logpond in the vicinity of Ulu Baleh, Kapit Division.

[5] On or about 27 September 2000, the defendant informed the plaintiff that Unique Evergreen would be terminating their contract with the defendant and the defendant was desirous to appoint the plaintiff as their main contractor in place of Unique Evergreen. Pursuant thereto, it was the plaintiff's pleaded case that it had entered into a collateral agreement, partly orally, partly in writing and partly by conduct with the defendant on the following terms:

(a) the defendant will enter into a timber extraction agreement appointing the plaintiff as their main contractor to replace Unique Evergreen for the timber operations;

(b) the defendant will sell a total of fourteen machineries to the plaintiff to be

used for the timber operations; and the defendant will ensure the plaintiff would make a net profit after making payments of various overheads; and

(c) the defendant will ensure that the income from the timber operation to be generated through sufficient volume to be allowed in the MPL, would be sufficient for the plaintiff to make a net profit after making payment of various overheads, in particular, the repayment of the machineries.

[6] The plaintiff maintained at all material times that it was as a result of the abovementioned collateral agreement that the plaintiff entered into the timber extraction agreement dated 13 October 2001 with the defendant. The salient terms of the timber extraction agreement are these:

> The main contractor warrants and represents that they are experienced logger to fell and extract and harvest hill timber logs in Sarawak and has inspected the said Concession area and thereby satisfied that it is in a position capable and interested to operate and fulfill the needs of the Licensee
>
> The Main Contractor is also an experienced log transportation operator by land and on its own or through representatives servants and agents had inspected the said Concession Area and also the route through which transportation of timber logs by land is to be carried out and is thereby satisfied that it is in a position capable and interested to operate and fulfill the needs of the Licensee to transport timber logs extracted to its Putai Logpond.
>
> ARTICLE ONE: NATURE OF CONTRACT
>
> (1.1) EXTRACTION OF TIMBER LOGS (h) The Main Contractor hereby undertakes to fulfill the Monthly Production Limit (MPL) as allocated by the Forest Department to Licensee failing which, the Main Contractor shall indemnify the Licensee for the loss suffered
>
> ARTICLE THREE: CONTRACT PRICE
>
> 3.1 In consideration of the obligations and undertakings on the part of the Main Contractor under this Agreement, the Licensee shall remunerate and pay to the Main Contractor at the following rates:-
>
> | | | | |
> |---|---|---|---|
> | (1) | | Meranti with diameter between 28cm and up but below 45 cm | RM 310.00 per hoppus ton |
> | (2) | (a) | Hard MLH with diameter 36cm and up but below 45 cm | RM 310.00 per hoppus ton |
> | | (b) | Peelable MLH with diameter 36 cm and up | RM 360.00 per hoppus ton |
> | (3) | | Hard and Peelable MLH with Diameter 46 cm and up, | |

	Selangan Batu, kapur, keruing With diameter 28 cm and up	RM 360.00 per hoppus ton
(4)	Meranti with diameter 36 cm and up	RM 360.00 per hoppus ton

ARTICLE TWENTY: ADDITIONAL TERMS

21.3 It is the intention and desire of the parties hereto that commercial and trade usages and practices and local customs if any normally connected and associated with the working extraction handling and transportation of timber logs in the concession areas and timber logs may be applicable in the context of this Agreement unless they are excluded expressly in writing.

[7] It was the plaintiff's pleaded case that in breach of the collateral agreement and/or the timber extraction agreement, the defendant had on 1 June 2000 unilaterally imposed a reduction on the contract fees by 20%, purportedly due to depressed timber market. The plaintiff's monthly invoice claim for the month of June 2001 was rejected by the defendant and the plaintiff was asked to re-submit their claims and all future claims based on the reduced rates. The plaintiff purportedly complied, albeit, with protest.

[8] It was the plaintiff's pleaded case that the reduction of the contracts fees was in breach of the collateral agreement and/or timber extraction agreement and that the defendant failed/neglected and/or refused to remedy such breach.

[9] The particulars of the defendant's breach and the damage suffered thereof by the plaintiff may be summarised as following:

(a) due to the reduction of the contract fees the plaintiff has suffered loss and damages in the sum of RM2,199,696.99;

(b) in breach of the collateral agreement and/or the Hire Purchase Act 1967, the defendant had illegally imposed interest charge on the four machineries (out of the 14 machineries) amounting to RM52,500;

(c) the defendant failed, neglected and/or refused to allocate and/or to notify the plaintiff about the MPL, thereby causing the monthly income of the plaintiff to be greatly reduced; and

(d) the defendant misrepresented to the plaintiff of their MPL that their productions were only 148,954.000 cubic meter for years 2001–2005 instead of the actual figures of 173,327.569 cubic meter and thereby underpaid the plaintiff resulting in loss and damage amounting to RM4,269,084.66.

[10] As a result of the above mention breaches allegedly committed by the defendant, the plaintiff commenced this action in the High Court claiming for:

(a) wrongful reductions of the contract fee;

(b) misrepresentations as to volume of timber extracted;

(c) failure to allocate and/or notify the MPL; and

(d) wrongful imposition of interest on the equipment sold.

[11] The defendant in its defence denied the existence of the collateral agreement. The defendant had persistently maintained that the reduction of the contract fees was duly made in accordance with the timber extraction agreement and the plaintiff had by conduct accepted the reduction. At the same time the defendant had also counterclaimed for special damages by reason of the plaintiff's failure to achieve the requisite MPL as stated in the timber extraction agreement.

HIGH COURT

[12] At the High Court the parties had agreed that the following issues to be determined:

(a) whether there was a collateral agreement entered between the plaintiff and the defendant;

(b) if so, did the defendant breach the collateral agreement and/or the timber extraction agreement, and what remedies (if any) is then due to the plaintiff;

(c) did the plaintiff breach the timber extraction agreement and what remedies (if any) is then due to the defendant; and

(d) was there any estoppel from the adjustment and reduction of the contract price and/or whether the defendant is entitled to reduce and adjust the contract price pursuant to cl 21.3 of the timber extraction agreement.

[13] The plaintiff called two witnesses to prove their case. The defendant on the other hand called nine witnesses to rebut the plaintiff's claim and to prove their counterclaim. After a full trial the learned trial judge found for the plaintiff and dismissed the defendant's counterclaim. In so doing Her Ladyship made the following orders:

(a) the plaintiff's claim for loss due to wrong reduction of contract rates was allowed in the sum of RM639,328.50;

(b) the plaintiff's claim for loss due to misrepresentation was allowed in the sum of RM484,705.80;

(c) the plaintiff's claims for losses due to failure to allocate MPL and for wrongful deduction of interests were dismissed; and

(d) the defendant's counterclaim for the plaintiff's failure to achieve the requisite MPL as stated in the timber extraction agreement was dismissed with costs.

[14] The learned judge in granting the abovementioned orders was guided by the following findings:

(a) that there was no collateral agreement between the plaintiff and the defendant and it follows that there was no such breach of the said agreement. The plaintiff did not purchase any of the purported vehicles allegedly as per the collateral agreement from the defendant. In contrast the plaintiff had actually entered into a written agreement with Timbereign for the purchase of the said vehicles (exh 13–141 DBD1). Since the plaintiff had bought the machineries from Unique Evergreen and Timbereign, it is only logical that defendant could not have given the alleged assurance of net profit as per the purported collateral agreement;

(b) the defendant on the other hand had breached the timber extraction agreement by reducing the rate of the contract fees unilaterally. The defendant has failed to establish that they were entitled, contractually, to revise and reduce the contract fees. The defendant's reliance on cl 21.3 of the timber extraction agreement to justify their revision of the contract rate has no connection to the contract price which is expressly stated in cl 3.1 of the timber extraction agreement;

(c) since the reduction of the contract fees was made unilaterally and the plaintiff continued to submit the claims on reduced rate under protest during the life span of the contract as evinced by exh 194 PBD1, the doctrine of estoppel does not apply to the plaintiff. However the plaintiff in opting to stay on with the timber extraction agreement after it had expired and by continuation to submit the claim on the reduced rate, was deemed to have agreed to the reduced rate of the contract fees. Hence, plaintiff was estopped from claiming for the loss from 13 October 2003 onward after the expiration of the timber extraction agreement. The plaintiff was entitled only to the loss from June 2001–October 2003, totaling 29 months;

(d) applied a higher rate of RM360 per hoppus ton in calculating the difference of the reduced contract rate owing to the plaintiff for the period of 29 months. The defendant's calculations as per exh 579 DBD was preferred instead of the plaintiff's which was inaccurate;

(e) the plaintiff' witness's assertion of not knowing and of not being informed by the defendant of the MPL was highly improbable and inconceivable. The plaintiff's contention of the defendant's refusal to furnish the MPL despite numerous requests was not substantiated by any proof;

(f) based on the royalty bills submitted by the plaintiff that there was a misrepresentation of actual production by 2,416.569 m3 (after deduction of timber production from other contractors ie Unique Green and Limpah Mewah) for which the plaintiff was underpaid; and

(g) the plaintiff had failed to meet the MPL despite defendant's reminder to the plaintiff to increase the timber productions. As a result the plaintiff is libel to indemnify the defendant under cl 11(h) of the timber extraction agreement. However the defendant had failed to prove the loss it has suffered from the production shortfall. The defendant's computation of damages for the production shortfall based on DW 9's calculation was rejected as the defendant has not adduced the source document to support DW9's evidence purportedly based on the financial report and audited accounts of the defendant.

[15] Aggrieved by the abovementioned decision the defendant appealed to the Court of Appeal. The plaintiff in turn filed a cross-appeal against the said decision.

SUBMISSIONS

[16] Before us learned counsel for the defendant had submitted that the learned trial judge:

(a) erred in holding that the defendant had breached the contract by reducing the contract fees unilaterally and as a result the plaintiff was entitled to the loss from June 2001–October 2003, totalling 29 months, in the sum of RM639,328.50. In reference thereof he referred us to the cases of *New Chew v KBC Sawmill Sdn Bhd & Anor* [1996] MLJU 524; [1998] 1 CLJ Supp 16; *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611; *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1 (SC) in support of his proposition;

(b) erred in concluding that estoppel did not apply in this case as the plaintiff had continued to submit all subsequent claims under protest due to economic duress purportedly asserted by the defendant although evidence to the contrary clearly shows that there was an estoppel by conduct where the parties had acted on the revised contract fees;

(c) failed to consider the material evidence before her that the reduction of

A the contract fees was in tandem with the depressed timber market at the material time. The revised contract fees during such period of time were just as good 'as if they had written down as being a variation of the contract as per article 21.3 of the timber extraction agreement'.

B (d) erred in awarding RM484,705.80 for the alleged misrepresentation of the actual log production as she failed to consider the express intention of the parties in writing, which is stated in article 3.2 of the said timber extraction agreement which stipulated that for the purpose of calculating all contract price in respect of timber logs, there shall be a 2-centimetre C deduction in girth of each log. The calculations made on a higher rate of 360 per hoppuston, disregarding the clear and unambiguous terms of article 3.2 was wrong. In reference thereof learned counsel referred to the case of *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1992] 1 MLJ 587; [1997] 1 CLJ 23 (CA); and

D (e) erred in placing her reliance on the royalty bills that were submitted by the plaintiff in ruling that there was a misrepresentation as the royalty bills did not project the plaintiff's actual log production.

E **[17]** Learned counsel further submitted that:

(a) the plaintiff had failed to prove its damages. The plaintiff cannot recover the purported sums unless the sums it claimed are duly pleaded and proved according to law. In support thereof he referred to us the cases of *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] F 1 CLJ Supp 147; and *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 4 CLJ 785;

(b) the defendant had suffered and proved the net loss of RM1,505,252 following from the plaintiff's failure to meet the requisite MPL DW9, the G chief financial controller of the defendant and the WTK Group of Companies had clearly testified based on contemporaneous documents to substantiate the claim. Hence the learned judge erred in rejecting the evidence of DW9; and

H (c) the cross-appeal filed by the plaintiff seeking for loss due to the defendant's failure to allocate the MPL was scandalous and is without merit.

[18] Learned counsel for the plaintiff had conversely submitted that:

I (a) the defendant had on 1 June 2001 breached the timber extraction agreement by unilaterally imposing a reduction on the contract fees by 20%, purportedly due to the depressed timber market. The plaintiff had maintained that it had continuously by letters (under protest), requested the defendant to revive the contract fees;

(b) the learned trial judge was correct to hold that, cl 21.3 of the timber extraction agreement has no connection to the contract prices which have been expressly set out in cl 3.1 of the same;

(c) the learned trial judge was right to hold that the defendant had failed to prove that there was a depressed market and that there was no such custom to adjust the contract fees;

(d) the learned trial judge was right to hold that the plaintiff had never agreed to the reduction of the contract fees and that estoppel did not apply in this case, as the plaintiff had continued to submit all subsequent claims under protest;

(e) however, the learned trial judge erred in holding that the timber extraction agreement was only valid for three years disregarding the salient terms of articles 2 and 15 of the timber extraction agreement;

(f) the learned trial judge having found that the defendant had misrepresented, as to the actual volume of the timber extracted based on the royalty bills had erred in deducting the volumes purportedly produced by other subcontractors;

(g) the defendant had failed to discharge its burden of proving that it had notified the plaintiff of what the MPL figures were; and

(h) the learned trial judge was correct to hold that the defendant had failed to adduce any or any sufficient evidence to support their counterclaim.

FINDINGS

[19] The issues raised in this appeal rests upon the notion of whether the learned trial judge had misdirected herself on the evaluation of facts and evidence in arriving at her decision. It also raises the issue of appellate intervention on findings of facts by the learned trial judge.

[20] The law on appellate intervention on finding of facts by a trial judge is trite. In this context it may be useful to refer to the case of *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184; [1982] CLJ 107 (FC), wherein it was held that an appellate court will only interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded.

[21] In the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing

witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error results in serious injustice.

[22] In *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC), the Federal Court echoed the following:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely relate to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.

[23] Before us, the findings of the learned trial judge were attacked principally on the ground that she had failed to judicially appreciate the evidence adduced in this case. Although we are mindful of the limits of the powers of an appellate court to intervene with a finding of facts by a trial court, however based on the surrounding facts and circumstances of the present appeal we are convinced that the learned trial judge did not properly evaluate the evidence and asked herself the right question in arriving at the decision as she did. Having gone through the record of appeal and the grounds of judgment we find that there was clear misdirection on her part and we shall deal with this in stages.

[24] Firstly, we shall address the learned trial judge's findings on the issue of estoppel. In this regard the learned trial judge held that:

> In my judgment, the defendant had breached the timber extraction agreement by reducing the rate of the contract fee unilaterally and the plaintiff continued to submit the claims on reduced rate under protest as evidenced by exh 194 PBD1. As such, the doctrine of estoppel does not apply to the plaintiff in this case.

Having found that estoppel does not apply to the plaintiff in this case the learned trial judge further held that:

It must be noted that the period of the timber extraction agreement was three years from 16 October 2000, but the plaintiff continued on for four years 11 months. There was no reason for the plaintiff to stay on the timber extraction agreement if it objected to the reduced rate. Thus, by opting to stay on the timber extraction agreement after it had expired and by continuation to submit the claim on the reduced rate, the plaintiff was deemed to have agreed to the reduced rate of the contract fee. Accordingly, it is stopped from complaining about suffering loss due to lower rate of the contract fee.

[25] The issue now is whether the plaintiff's act of continuing with the contract at the reduced contract fees was caught by estoppel. Against this backdrop learned counsel for the defendant, submitted that the plaintiff by continuing to remain in the concession area and carrying on their daily harvesting operation and by electing to continue to bill the defendant based on the revised rate, evinced an intention to continue with the new contract is therefore estopped from denying the same.

[26] In determining whether plaintiff is deemed to have been caught by estoppel we have examined the continuing course of conduct in the performance of the contract with revised contract fees over many years. The conduct of the parties can be summarised as follows:

(a) during the first period of the revised contract fees the plaintiff had accepted the revised contract fees of RM310 per hoppus ton but still tried to appeal for a better rate of contract fees in protest. This is evident from the letters sent out to the defendant which was dated 6 June 2001, 10 August 2001, 11 September 2001, 19 November 2001, 2 May 2001 and 22 August 2001; and

(b) by letter dated 25 June 2001, the plaintiff had facilitated the reduction of the contract fees by minimising the operation costs with imposition of 20% salary deduction, 50% reduction of commission rate, total waiver of allowance, 30% retrenchment of camp staff.

[27] Upon perusal of the said letters and based on facts and circumstances of this case it is clear to us that the purported letters which were sent to the defendant were not letters of protest to put the contract to an end or a refusal to perform the contract but rather to appeal for a better rate. To put it simply, the plaintiff did not insist on the enforcement of its rights under the original contract but instead had continued to work for the defendant from 1 June 2001–30 November 2005. In tandem with the reduced contract rate and in order to minimise the operation costs the plaintiff had reduced the staff salary and commission. The totality of circumstances when viewed as a whole clearly demonstrates to us that the plaintiff had accepted the reduced contract fees and continued to perform the contract when it had the option of insisting on the

performance of the terms of the original contract. As such, we find that the plaintiff is barred from asserting something when it had the right and opportunity to do so earlier.

[28] We find that the doctrine of estoppel applies to estop the plaintiff from making any claim which appears to be an afterthought against the defendant under the contract. To us it would be unjust and unconscionable to permit the plaintiff to file an action to question the validity of the reduction of the contract fees after six years.It should be noted that there was no letter of demand issued by the plaintiff until 28 March 2007. This letter of demand was issued nearly two and a half years after the plaintiff had resigned as the defendant's contractor.

[29] The defence of estoppel has been succinctly discussed by Lord Denning in the *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Bank Commerce International* [1982] QB 24:

> … when the parties to a transaction proceed on the basis of an underlying assumption-either of fact or of law-whether due to misrepresentation or mistake makes no difference-on which they have conducted the dealings between the,-neither if them will be allowed to go back on that assumption when it would be fair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[30] The case of *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Bank Commerce International* was referred to by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283. Speaking for Federal Court, His Lordship in elucidating the doctrine of estoppel had this to say:

> It is not an integral part of the doctrine of estoppel that a litigant who invokes the doctrine of estoppel must prove that he was induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine, in this respect, all that needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encouragor to insist upon his strict legal rights.

[31] We accept the foregoing pronouncements as a correct statement of law. Applying the abovementioned pronouncements to our present case it is our considered view that the plaintiff by continuing to remain in the concession area and carrying on their daily harvesting operation and by electing to

continue to bill the defendant based on the revised rate, evinced an intention to continue with the contract. It does not now lie in the mouth of the plaintiff to assert otherwise.

[32] Further to the foregoing, we would also like to address on the extent of the application of s 40 of the Contracts Act 1950 to this present appeal. The learned trial judge ruled that the plaintiff was not caught by estoppel in continuing to perform the contract at the reduced contract fees because:

> … the plaintiff being and innocent party, had an option under s 40 of the Contracts Act 1950 to stay on the contract and claimed for damages later. This is what the plaintiff had opted in this case.

[33] The above findings were subject to criticism by learned counsel for the defendant who submitted that the learned trial judge's interpretation of s 40 of the Contracts Act 1950 is contrary to the law. Learned counsel argued that s 40 of the Contracts Act does not allow the plaintiff to stay on the contract and claim for damages later. In this regard we would like to refer to s 40 of the Contracts Act 1950 which stipulates as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[34] Based on the abovementioned scheme of provision, we are of the view that if one party to a contract has refused to perform or disabled himself from performing his promise in its entirety the other party as an innocent party may accept that non performance, repudiate the contract and sue for damages for breach of contract. In the event he elects to disregard the breach, the contract remains in full effect and he is said to have 'affirmed', the contract. The test for deciding whether the innocent party elected one way or the other is an objective one and it is for the court to infer from the surrounding circumstances of each case, (per Gopal Sri Ram in *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420; [2006] 4 CLJ 267) ('*Mintye*').

[35] In *Mintye* the Court Appeal was faced with the question of whether there was an implied election by the plaintiff as there was no express election by the plaintiff to treat the contract as at an end. The facts of the case is this: By a sale and purchase agreement dated 27 November 1995, the plaintiff agreed to purchase a piece of land from the defendant for RM33,308,589 for the purpose of developing it into a housing project. Having executed the agreement, the plaintiff paid 60% of the purchase price. It was a term of the agreement that the plaintiff was not bound to pay the balance price until Form G under the Land Acquisition Act 1960 was issued by the land office. By letter dated 29 May

1996, the defendant informed the plaintiff of the state government's decision to impose a quota on the project (effectively binding the plaintiff to sell the housing units only to Bumiputras), and gave the plaintiff two weeks to decide whether to proceed with the project. By letter dated 14 August 1996, the plaintiff proposed an alternative quota, and subsequently, by letter dated 10 September 1996, intimated its willingness to complete the project if the alternative quota was accepted. The defendant, however, did not accept the alternative quota, and so, by letter dated 10 December 1997, the plaintiff withdrew from the project and asked for a refund of the monies it paid the defendant. The defendant alleged breach of contract and in the event invoked the forfeiture clause in the agreement (cl 9.1) and forfeited 10% of the purchase price. The plaintiff applied to the High Court to recover the forfeited sum, but the application was dismissed on the grounds that: (a) the quota was within the contemplation of the parties and was validly imposed bearing in mind cll 1.1, 6(g) and 7(b) of the agreement; (b) the plaintiff was in breach of the agreement when it withdrew from the project; (c) cl 9.1 was properly invoked by the defendant; and (iv) the agreement could not have been dispensed with under s 64 of the Contracts Act 1950, such dispensation being barred by cl 10 of the agreement. Aggrieved by the High Court decision the plaintiff appealed.

[36] The Court of Appeal in allowing the appeal by the plaintiff held that 'The act of the defendant in introducing a new term into the contract and insisting on its compliance was a clear breach of contract. The defendant was not entitled to do what it did. Clearly, by seeking to introduce an obligation that did not theretofore exist, the defendant was imposing on the plaintiff a contract altogether different from the agreement of 27 November 1995. The defendant was in short imposing a new contract. In the state of affairs in which the plaintiff found itself on 29 May 1996, it had a choice whether to treat the contract as at an end or elect to perform the new contract in accordance with s 40 of the Contracts Act 1950. On the facts, there was no express or implied election by the plaintiff to treat the contract as at an end. The plaintiff also did not affirm the original contract of 27 November 1995. What it did was to ask for a revised version of the new contract imposed by the defendant. The plaintiff, thus, was making a new contract, albeit its 'new contract' was different from the 'new contract' imposed by the defendant. Be that as it may, the parties, by their conduct, had mutually put an end to the original contract and that contract ceased to exist with effect from the plaintiff's letter of 10 September 1996'.

[37] Based on the ruling of the Court of Appeal in *Mintye* and at the risk of repeating ourselves may we reiterate that the test for deciding whether the innocent party elected one way or the other is an objective one and it is for the court to infer from the surrounding circumstances of each case. In *Mintye* the defendant sought to include a new term in the contract and the plaintiff

counter offered to revise the defendant's proposal. The Court of Appeal ruled that it can be inferred by the letter dated 10 September 1996 the parties by conduct had mutually put an end to the original contract.

[38] Applying the foregoing principles of s 40 of the Contracts Act 1950 to our present case and the test propounded in *Mintye* we find that the plaintiff in our present case after realising the purported non-performance of the contract by the defendant and having the option of accepting the non performance and ending the contract, had continued to work in the logging operations for the defendant for the period of nearly 54 months. Having done so, we are of the considered view that the plaintiff is said to have 'affirmed' the contract and acquiesced in its continuance. The plaintiff had accepted the breach and elected to continue with the contract by performing his part of the bargain. This election was clearly communicated to the defendant by its act of continuing with the contract with the reduced contract fees. Applying the objective test as propounded in *Mintye*, we hold that the plaintiff did not put an end to the original contract and it was still subsisting. The plaintiff having made such election cannot retract itself from it.

[39] That being the case, with respect, we find that the learned trial judge had clearly misdirected herself when she held that 'the plaintiff had an option under s 40 of the Contracts Act 1950, to stay on the contract and claimed for damages later'. We agree with the submission of the learned counsel for the defendant that such interpretation is contrary to the law. Section 40 does not allow the plaintiff to stay on the contract and claim for damages later. As we have alluded to in the earlier part of this judgment the affirming party cannot be permitted to change his position once he has elected to exercise his option.

[40] Based on the foregoing, the defendant's appeal must be allowed. However for completeness we would like to address the other issues raised by the parties in their submissions. Firstly, we would address the issue of damages as awarded by the learned trial judge. In this regard the learned trial judge held that the defendant had failed to account for the production of logs in the volume of 2,416.569M on the ground of the misrepresentation of actual production. Learned counsel for the defendant submitted that learned trial judge had proceeded to award RM484,705.80 as damages for the underpayment and disregarded the clear intention of the parties under the timber extraction agreement. We are in agreement with him on this point. As rightfully argued by counsel, the learned judge had failed to consider the express intention of the parties in writing which is stated in article 3.2 of the said timber extraction agreement.

Article 3.2 clearly stipulated that:

> For the purpose of calculating all contract price in respect of timber logs extracted and transported the parties hereto agree that there shall be a 2-centimetre deduction in girth at the time of assessment of quantity of timber logs transported and extracted in the presence of both parties.

The words used in article 3.2 are clear and unambiguous in that for the purposes of calculating the contract price there shall be a 2cm deduction in girth at the time of assessment of quantity of timber logs transported and extracted in the presence of both parties. We are of the considered view that the learned trial judge ought to have given full effect to the words contained in it. We cite with full agreement the case of *Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587; [1997] 1 CLJ 23 (CA) relied by the defendant. In that case Gopal Sri Ram JCA, in referring to the case of *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, quoted the speech of Gibbs J (as he then was). Gibbs J said:

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose if avoiding a result which is considered to be inconvenient or unjust ….

[41] In the present case the learned trial judge in calculating the underpayment owing to the plaintiff and the misrepresentation of the actual log productions was guided by the information in the Forestry Department's royalty bills for the year 2001–2004. The royalty bills were documents produced by the Forestry Department of Sarawak. The defendant's witness Mr Lau Sie Yiu ('DW2') had explained that these royalty marking included logs extracted by the defendant's previous contractor, Unique Evergreen amounting to 4,180 m3 (2319 hoppus ton) and the logs extracted by Limpah Mewah amounting to 17,766 m3 (9855 hoppus ton). Royalty bills issued by the Forestry Department to the defendant as contained in PBD4, PBD5 and PBD6 show a total production of 173,327.569 being the gross volume of timber logs and all the species of logs under the defendant as the licence holder of the licensed area. For computation of the contract fees it is subjected to 2cm deduction in girth based on article 3.2 of the contract.

[42] The learned trial judge in addressing this issue held that: A

> This court believes DW2 that the royalty bills for 2001 included the timber production by the previous contractor and the royalty bills for Year 2003 included the production by the secondary contractor, Limpah Mewah from April to August 2003. Their total volume is 21,957 m3 (4183 m3 + 17,766 m3). Deducting 21,957 m3 from 24373.569 (173,327.569 m3 — 148,954.000 m3), leaving a balance of 2,416.569 which has not been accounted for by the defendants. Hence, this court is satisfied that the plaintiff has shown on the balance of probability that there is a misrepresentation of actual production by 2,416.569 m3 or 1340.304 hoppus ton (1.803m3 = 1 hoppus ton) for which it had been underpaid. B C

Premised on the findings of the learned trial judge as stated above, we are of the considered view that although the learned trial judge acknowledged the fact that the royalty bills contained information of gross production of timber logs from other contractors, Her Ladyship however erred in relying on the same disregarding the fact that the amount stated therein is subjected to 2cm deduction in girth based on the terms of the contract as rightly submitted by counsel for the defendant. D

[43] Further, we find that the learned trial judge had fallen into error when she relied solely on the royalty bills submitted by the plaintiff, notwithstanding the fact that the plaintiff had failed to call the relevant authority as a witness to prove or substantiate the contents in the royalty bills which was issued by the Sarawak Forestry Department. E

[44] It is also our finding that there was a failure on the part of the trial judge to adhere to the strict evidentiary requisite in admitting the royalty bills. As rightfully pointed out by the counsel for the defendant that the purported royalty bills were computer generated documents wherein one should adhere to the requirement under s 90A of the Evidence Act 1950. F

Section 90A of the Evidence Act 1950 clearly provides that: G

> Admissibility of documents produced by computers, and of statements contained therein
>
> 90A. (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement. H
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used. I

[45] Premised on the above scheme of provision it is trite that a document produced by a computer must be proved it was produced in the course of its ordinary use by tendering in evidence a certificate under s 90A(2) of the Evidence Act. Given the fact that the contents of both the documents were being disputed we find that the learned trial judge had fallen into error when she relied on the said purported royalty bills without the calling of the maker to explain the particulars. It is trite law that the burden of proof always lies on the claimant to prove his claim. Even if the authenticity of documents were not disputed, the contents must be strictly proved according to law. In *Alliedbank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; [1998] 2 CLJ 33, it was held that:

> it is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called …
>
> The non-compliance with this rule will result in the contents of the documents being hearsay

[46] Another misdirection on the part of the trial judge can be seen in the instance whereby the plaintiff was awarded damages notwithstanding its failure to produce any statement of account, source of information and computation or breakdown of the alleged loss flowing from the alleged breach. In *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569; [1994] 4 CLJ 783 the then Supreme Court echoed that that it is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the facts and the amount of damages before he can recover.

[47] In the instant case it is our considered view that the plaintiff had failed to prove that it can recover the sum of RM639,326.50 as the loss resulting from the reduction of contract fees; and RM484,705.80 as the loss resulting from the misrepresentation based on RM360 per hoppus ton. The plaintiff had failed to prove both type of losses as the plaintiff's principal witness, PW1 who tendered the plaintiff's calculations of the loss as in exh P1 did not prove the facts and particulars stated therein to substantiate the alleged losses suffered by the plaintiff. More so, the plaintiff failed to call the auditors and produce the audited accounts to support the claims in proving damages. Thus it is our findings that the learned trial judge had misdirected herself when she had preferred the calculations submitted by the defendant's witnesses (DW2 at exh 579 DBD3) to award damages in favour of the plaintiff despite the fact that the plaintiff did not prove the basis of their calculations on the said amounts. Indeed this was a fact which was acknowledged by the learned trial judge at p 40 of her judgment which reads:

In my judgment, the fact that the plaintiff had made its claim at RM310 shows that PW1 was not truthful in asserting that DW1 had verbally informed him that the contract fee was at a flat rate of RM360 for all species.

In my judgment, the actual contract rate is as per stated under article 2.3 of the timber extraction agreement.

Given that there are different rate of contract fee depending on the size, hard orpeelable, the plaintiff's calculation of loss as per exh P1 is therefore inaccurate. I would therefore rely on the calculation of DW2 ie exh 579 DBD3.

[48] At p 50 of the grounds of judgment the learned trial judge remarked the following:

Without the evidence as to what species of timbers for which the plaintiff had been underpaid, I would therefore apply a higher rate if RM360 M3 and the

(Emphasis added.)

[49] Thus, we are of the considered view that the learned trial judge erred in facts and law when she proceeded to award damages in favour of the plaintiff's notwithstanding the fact that they failed to prove the same. The learned trial judge in opting to adopt the defendant's calculations however probable it may be does not dispense the onus on the plaintiff to prove the alleged loss or damages. Undoubtedly, the burden of proof in seeking substantial damages lies with the plaintiff. In this regard we can do no better than to quote Edgar Joseph Jr J (as he then was) in the case of *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 361; [1990] 2 CLJ 635 (Rep) at p 644, wherein the learned judge held that:

It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

Similarly in this case the plaintiff failed to prove the facts and the amount of damages it is entitled to. We find that the plaintiff has proved neither and as a result thereof this action must fail.

[50] Since it is our findings that the plaintiff have failed to proof its losses, it follows that the cross-appeal cannot stand. As for the issue of the plaintiff not knowing what the MPL was, we take this opportunity to endorse the learned trial judge's findings on that point that:

It is inherently improbable that PW1 did not know or did not enquire about the monthly production limit. Further the 'Monthly Production Limit' appears twice in cl (1.1)(h) and (2.1) of the agreement. It is more probable than not PW1 or the plaintiff knew and was aware of the monthly production limit otherwise how the plaintiff is going to perform the agreement.

[51] As for the issue of the defendant's counterclaim the learned trial judge found that:

DW9, Ting Soon Eng, chief financial officer of the defendant and WTK Group of Companies, had tabulated the MPL, plaintiff's actual production and the shortfall in her answer to Q16 of DW9's WS

At trial, DW9 sought to tender extract of the audited account and analysis of cross check to substantiate her calculation in Q and A 17DW9 WS. This was objected to by the counsel for the plaintiff on the ground that these documents had never been shown to the plaintiff and to produce them at the defense stage would prejudice the plaintiff who did not have a chance to study them or consult the accountant.

I was of the view that any documents relied on by the defendant to substantiate its claim ought to have been produced at the discovery stage, not at the hearing as it will catch the plaintiff by surprise. Hence, I sustained the objection.

[52] Having sustained the objection on the admissibility of the audited accounts the learned trial judge further held that:

It must be note that the defendant has not adduced the source of document to support DW 9's evidence and various calculation in DW9's WS purportedly based on the financial report and audited accounts of the defendant. As such, this court has no choice but to reject DW9's calculation (see *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ 635 (Rep).

[53] We find that the learned trial judge was correct in rejecting the testimony of DW9 on the calculation of the defendant's counterclaim on the ground that the extract of the audit account and analysis of cross-check to substantiate their calculation through DW9 was not produced at the discovery stage and the source document has not been adduced to support DW9's evidence.

[54] In conclusion we make the following orders:

(a) the defendant's appeal against the decision of the learned trial judge is hereby allowed and the orders made by the learned trial judge with regards to the plaintiff's claims are hereby set aside;

(b) the defendant's appeal against the decision of the learned trial judge in respect of their counterclaim is hereby dismissed and the learned trial judges findings on the same is hereby affirmed; and

(c) the plaintiff's cross-appeal is dismissed.

[55] We now invite parties to address us on costs.

Defendant's appeal allowed and plaintiff's cross-appeal dismissed.

Reported by Kanesh Sundrum